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411518—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA

v.

JAMES B. HUNT AND GOPHER SALES COMPANY

No. ——

UNITED STATES OF AMERICA

v.

HAROLD A. OLLHOFF AND GOPHER SALES COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court has not yet been reported. A copy is annexed as Appendix A, *infra*, pp. 7–13.

JURISDICTION

The order of the District Court dismissing the indictments for failure to state an offense was entered

November 6, 1956 (App. A, *infra*, p. 13). Notices of appeal to this Court were filed on November 23, 1956. The jurisdiction of this Court to review on direct appeal an order, based on a construction of the statute on which indictments are founded, dismissing the indictments is conferred by 18 U. S. C. 3731.

QUESTION PRESENTED

Whether a pinball machine, the operation of which involves an element of chance as the result of which the player may become entitled either to free plays or money, is the type of gaming device which is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461 (2) upon "so-called 'slot' machines" as defined in 26 U. S. C. (Supp. III) 4462 (a).

STATUTE INVOLVED

The Internal Revenue Code of 1954, 26 U. S. C., Supp. III, provides in pertinent part:

> SEC. 4461. *Imposition of tax.*
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);
>
> (2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. * * *

SEC. 4462. *Definition of coin-operated amusement or gaming device.*

(a) *In general.*—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—

(1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens,

(b) *Exclusion.*—The term "coin-operated amusement or gaming device" does not include bona fide vending machines in which are not incorporated gaming or amusement features.

(c) *1-cent vending machine.*—For purposes of sections 4461 to 4463, inclusive, a vending machine operated by means of the insertion of a 1-cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens, shall be classified under paragraph (1) and not under paragraph (2) of subsection (a).

STATEMENT

The indictment in each of these cases charged the defendant named therein with having wilfully failed to pay the special occupational tax imposed by 26 U. S. C. 4461 (2), *supra,* upon coin-operated "so-called 'slot' machines" as defined in 26 U. S. C. 4462

(a) (2), *supra,* maintained on his premises. Each machine involved was described as a "so-called 'slot' machine of the pinball type, which operated by means of insertion of a five (5) cent coin and which by application of the element of chance did entitle the person playing and operating the machine to receive cash, premiums and merchandise from the defendant."

The District Court, on motion of the defendants, dismissed the indictments for failure to state an offense. The court adopted the decision of the Court of Appeals for the Seventh Circuit in *Korpan* v. *United States,* decided September 28, 1956, petition for a writ of certiorari pending, No. 596, this Term. That court had held that a pinball machine is not within the definition of a "so-called 'slot' machine" in 26 U. S. C. 4462 (a) (2) even though the machine is operated by a coin and, by application of element of chance, entitles the player to cash or premiums.

THE QUESTION IS SUBSTANTIAL

The question presented by this appeal is the same as that presented in the petition for a writ of certiorari in *United States* v. *Korpan,* No. 596, seeking review of the decision of the Court of Appeals for the Seventh Circuit on which the District Court in the instant case relied.[1] As there pointed out, the interpretation of the statute adopted by the Seventh Circuit, and by this decision, is not in accord with the literal terms of the statute. The machines in question

[1] The instant cases are referred to at page 6 of the *Korpan* petition, and the opinion below is set forth in the *Korpan* petition at pp. 28–34.

fall within the literal terms of Section 4462 (a) (2) since they are operated by a coin and, by application of the element of chance, the player may be entitled to receive cash or premiums. The decision of the District Court is at variance with Treasury Regulations (26 C. F. R. 1949 ed.) 323.22 (b) which have been in effect since 1942 and which define, as examples of gaming devices within the "so-called 'slot' machine" definition of 4462 (a) (2), pinball machines "with respect to which unused 'free plays' are redeemed in cash, tokens, or merchandise * * *." The decision below is also contradicted by the legislative history of the statute which is discussed at pages 6–13 of the *Korpan* petition. That history shows that machines with the primary function of acting as gaming devices (including pin-ball machines operated as those in this case) were intended by Congress to be subject to the heavier tax imposed upon "so-called 'slot' machines" as distinguished from amusement devices. This intention was expressed when the tax was first imposed. It was reaffirmed by subsequent reenactments without change in the definition, after representatives of the industry had called the attention of Congressional committees to the Treasury interpretation that the tax was imposed according to the use of the machine, and had requested corrective legislation. Congress has taken no action to change the Treasury interpretation.

As pointed out in the *Korpan* petition, pp. 5–6, the interpretation adopted by the Seventh Circuit and the District Court will have a serious effect on the revenue

and on the enforcement of federal gambling laws. It is estimated that revenue of approximately $3,500,000 per year will be affected, as well as numerous forfeitures and criminal prosecutions.

CONCLUSION

For the reasons stated above and in the *Korpan* petition, the question presented is an important one which should be resolved by this Court.

Respectfully submitted.

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BEATRICE ROSENBERG,
Attorney.

JANUARY 1957.

APPENDIX

In the United States District Court, District of Minnesota, Third Division

No. 7980 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JAMES B. HUNT AND GOPHER SALES COMPANY, DEFENDANTS

No. 7988 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HAROLD A. OLLHOFF AND GOPHER SALES COMPANY, DEFENDANTS

MEMORANDUM ORDER

These two proceedings are before the Court on defendants' motion in each case to dismiss the indictments herein on the ground that they "do not state an offense."

Mr. Ray G. Moonan and Mr. Harry E. Ryan, Minneapolis, Minnesota, appeared as attorneys for defendants in support of said motions, and

Mr. George E. MacKinnon, United States Attorney, St. Paul, Minnesota, appeared as attorney for plaintiff in opposition thereto.

The indictments are substantially the same for present purposes. They charge the defendants with maintaining and operating within a certain place and

premises occupied by them "a so-called 'slot' machine of the pinball type, which operated by means of insertion of a five (5) cent coin and which by application of the element of chance did entitle the person playing and operating the machine to receive cash, premiums and merchandise from the defendants, and said defendants did then and there and in the manner aforesaid engage in and carry on a trade and business subject to tax imposed by the Internal Revenue Code of 1954, Section 4461 (2) * * * and Section 4901 * * * all in violation of the Internal Revenue Code of 1954, Section 7203."

The applicable statutes are as follows (all references are to the Internal Revenue Code of 1954):

> § 4461. IMPOSITION OF TAX
>
> There shall be imposed a special tax to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated amusement or gaming device at the following rates:
>
> (1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);
>
> (2) $250 a year, in the case of a device dedefined in paragraph (2) of section 4462 (a); and
>
> (3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shall not be considered an additional device.
>
> § 4462. DEFINITION OF COIN-OPERATED AMUSEMENT OR GAMING DEVICE
>
> (a) In general.—As used in sections 4461 to 4463, inclusive, the term "coin-operated amusement or gaming device" means—
>
> (1) any amusement or music machine operated by means of the insertion of a coin, token, or similar object, and

(2) so-called "slot" machines which operate by means of insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens.

* * * * *

§ 4463. ADMINISTRATIVE PROVISIONS

(a) Trade or business.—An operator of a place or premises who maintains for use or permits the use of any coin-operated device shall be considered, for purposes of chapter 40, to be engaged in a trade or business in respect of each such device.

* * * * *

§ 4901. PAYMENT OF TAX

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

* * * * *

§ 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX

Any person required under this title to pay any estimated tax or tax * * * who wilfully

> fails to pay such estimated tax or tax, * * *at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

The gist of the issue in the instant cases is whether the "coin-operated gaming device" in question is an amusement device within the definition thereof in Section 4462 (a) (1), or a gaming device as defined in Section 4462 (a) (2).

Considering a like motion made by defendants in eleven cases this Court, on February 29, 1956, refused to grant a dismissal, and in an accompanying memorandum, said:

> It is sound law that interpretation of statutes levying taxes should not permit implication to prevail above and beyond the clear import of the language used. Doubts in that respect are to be construed most strongly in favor of the defendants.[1] * * * I am not convinced at this posture of the case that the indictments go beyond the clear import of the language used in the applicable statutes.

On that occasion the Act quoted hereinbefore had not been interpreted by any binding appellate decision. Hence the Court's "judicial abstention"[2] from a holding that might be considered an unwarranted extension of the Act. On September 28, 1956, the Seventh Circuit Court of Appeals rendered a decision in point.[3]

Stare decisis in the District of Minnesota must give way to a well-considered decision of a neighboring

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[1] *Gould* v. *Gould*, 245 U. S. 151, 153.

[2] *United States* v. *Five Gambling Devices*, 346 U. S. 441, 449.

[3] *United States* v. *Korpan*, 7 Cir., —— F. 2d ——.

Court of Appeals that has reached an opposite holding in a similar case.[4] As so clearly pointed out by the Eighth Circuit Court of Appeals, "it is elementary" that not only must a strict construction be applied to a criminal statute, but it must also receive "a uniform construction". It is the manifest duty of a federal trial court to follow the decisions of such federal courts in other Circuits (if not clearly erroneous) who have met with and decided the point in question.[5]

The government, critical of the decision in the Korpan case, supra, contends that:

> The basic error committed in the Court's decision is that it attempts to construe by resort to legislative history "clear" words in a statute. Then after importing the so-called legislative history it fails to properly understand it or apply it.

This reasoning is neither impressive nor persuasive.

The Government has not convinced me that the Korpan decision is demonstrably wrong. In that case the Court, with customary clarity, discussing similar questions to those here in issue, emphasizes that logic and law oppose the viewpoint of the government in the instant case, in these words:

> Section 4462 (a) (2) lays down three requirements in defining a coin-operated gaming device: (1) it must be operated by means of the insertion of a coin or similar object; (2) the application of the element of chance must be involved by virtue of which, (3) the machine may deliver or entitle the person playing or operating the machine to receive cash, premiums, merchandise or tokens.

---

[4] *McDonald* v. *United States*, 8 Cir., 89 F. 2d 128, 134.

[5] *Martyn* v. *United States*, 8 Cir., 176 F. 2d 609, 610. The Court of Appeals for the Eighth Circuit has not passed on the problem presented by the instant case.

It is the government's contention that if a particular machine incorporates these three incidents it meets the definition of a coin-operated gaming device and consequently is subject to the gaming tax rate of $250.00 for each such machine. The difficulty with this argument is that it overlooks the introductory language of paragraph (a) (2), i.e., "so-called 'slot' machine".

If the dictionary definition of "slot machine" were applied, it is clear that these machines would be covered by the definition of coin-operated gaming device. "A machine the operation of which is started by dropping a coin in a slot." Webster's New International Unabridged Dictionary, 2d Ed. 1955.

When the definition is considered with the choice of language employed by Congress, i.e., "so-called 'slot' machine" which operates by means of the insertion of a coin, token, or similar object * * *, it would appear that Congress intended a more restrictive meaning for the term "slot machine". Otherwise, there appears no purpose for the use of the language "so-called 'slot' machine".

The term "so-called" is a modifying word implying doubt as to the correctness or propriety of so designating a thing. See Webster's New International Unabridged Dictionary, 2d Ed. 1955. And the use of quotation marks to set off the word "slot" indicates that Congress did not intend the language "so-called 'slot' machine" to be as comprehensive as the dictionary definition of "slot machine". Every word used in a statute is presumed to have a meaning and purpose, and, if possible, every word must be accorded significance and effect. *Washington Market Co.* v. *Hoffman*, 101 U. S. 112; *Adler* v. *Northern Hotel Co.*, 7 Cir., 175 F. 2d 619. We conclude, therefore, that not only must these machines incorporate the three incidents noted above, but they must also be "so-called 'slot' machines".

> Since the term "so-called 'slot' machine" is not adequately defined in Section 4462 nor elsewhere in the Internal Revenue Code, it becomes necessary to resort to extrinsic evidence in order to accord meaning and purpose to this language.
>
> * * * * *
>
> Although the legislative history of Section 4462 does not clearly demonstrate the meaning and purpose which Congress intended to attribute to the language, "so-called 'slot' machine", it does indicate that Congress intended to exclude pinball machines from the category of gaming devices.
>
> * * * * *

To extend the term "slot machine" to the devices described in the indictments would be a perversion of the language used by Congress. When a rule of conduct is laid down in words that evoke in the average mind the definition set forth in Section 4462 (a) (2), *supra*, it requires a straining of the imagination beyond a reasonable point to include therein the pinball machines here involved.[6]

The language adopted by Congress in said Section 4462 (a) (2) as interpreted by the Court of Appeals for the Seventh Circuit points out an intent to expressly exclude the machines here in question from the definition of gaming devices, as set forth therein.

For the reasons above set forth, defendants' motions to dismiss must be granted.

IT IS SO ORDERED.

An exception is allowed to plaintiff in each case.

Dated this 6th day of November, 1956.

DENNIS F. DONOVAN,
United States District Judge.

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[6] *McBoyle* v. *United States*, 283 U. S. 25, 27.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 674, 675

UNITED STATES OF AMERICA,

vs.

JAMES B. HUNT AND GOPHER SALES COMPANY.

UNITED STATES OF AMERICA,

vs.

HAROLD A. OLLHOFF AND GOPHER SALES COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

APPELLEES' MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 674.

UNITED STATES OF AMERICA,

vs.

JAMES B. HUNT AND GOPHER SALES COMPANY.

No. 675.

UNITED STATES OF AMERICA,

vs.

HAROLD A. OLLHOFF AND GOPHER SALES COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

APPELLEES' MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

Appellees move the Court to affirm the orders sought to be reviewed on these appeals on the ground that it is manifest that the questions on which the decisions of these

causes depend are so unsubstantial as not to need further argument.

QUESTION PRESENTED.

The appellant's statement of the question presented is not entirely accurate in that it assumes that a pinball machine is a "gaming device" within the meaning of 26 U. S. C. (Supp. III) 4462. As noted by the District Court the "gist of the issue" in these appeals is whether the pinball machines are "gaming" devices within the meaning of the statute. (Jurisdictional Statement, App., p. 10.)

The correct question presented is:

> "Whether a pinball machine is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461 (2) upon 'so-called "slot" machines' as defined in 26 U. S. C. (Supp. III) 4462 (a) (2)."

A PINBALL MACHINE IS MANIFESTLY NOT A "SO-CALLED 'SLOT' MACHINE."

In a carefully considered and well-reasoned opinion the United States Court of Appeals for the Seventh Circuit has held that a pinball machine is not a "so-called 'slot' machine" within the meaning of 26 U. S. C. (Supp. III) 4462 (a) (2). *United States* v. *Korpan*, 237 F. 2d 676 (1956), petition for writ of certiorari granted, No. 596. The Seventh Circuit properly observed that the term "so-called" imports doubt as to the propriety of the succeeding phrase "slot machine" and, after examining the legislative history of Section 4462, concluded that the intent of Congress was to exclude pinball machines from the category of gaming devices, 237 F. 2d at 679 and 681. The Government's attack upon the opinion in *United States* v. *Korpan* is without merit. See Respondent's Brief in Opposition to Petition for Writ of Certiorari in No. 596. The question presented has been adequately and correctly resolved by

the Seventh Circuit; there is no reason for this Court to consider further that question.

THE QUESTION IS NOT SUBSTANTIAL.

The question is not made substantial by the Government's statement regarding "estimated" loss of revenue or "forfeitures and criminal convictions". It may more accurately be stated that a conclusion other than that reached by the Seventh Circuit in *United States* v. *Korpan*, would destroy the pinball machine industry and result in loss of revenue because an amusement game is economically unable to bear the heavier $250.00 annual tax rather than the annual $10.00 tax.

CONCLUSION.

For the reasons stated, it is respectfully moved that the orders of the District Court be affirmed.

Respectfully submitted,

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No. 674. UNITED STATES *v.* HUNT ET AL.; and

No. 675. UNITED STATES *v.* OLLHOFF ET AL. Appeals from the United States District Court for the District of Minnesota. *Per Curiam:* The judgments are reversed. *United States* v. *Korpan*, 354 U. S. 271. *Solicitor General Rankin*, *Assistant Attorney General Olney* and *Beatrice Rosenberg* for the United States. *Robert A. Sprecher* and *Harry E. Ryan* for appellees. Reported below: 146 F. Supp. 143.